

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

U.S. DEPARTMENT OF HOMELAND
SECURITY et al.,

Defendants.

CASE NO. 2:19-cv-02043-TSZ

**[PROPOSED] STIPULATED
PROTECTIVE ORDER**

1. PURPOSES AND LIMITATIONS

Discovery in this action is likely to involve production of protected, proprietary, or private information for which special protection may be warranted. Specifically, Plaintiffs seek discovery of records pertaining to individuals in a “system of records,” as defined by the Privacy Act, 5 U.S.C. § 552a(a)(5) (the “Act”), disclosure of which would potentially constitute a violation of criminal and civil law under section 552a(b) of the Act, absent an Order from this Court pursuant to section 552(b)(11) of the Act. Furthermore, since disclosure of such records for purposes other than this litigation could reasonably be expected to constitute an unwarranted invasion of privacy,

the parties hereby stipulate to and respectfully request that this Court enter the following Stipulated Protective Order restricting the use of such information for purposes of this litigation only.¹

Pursuant to 5 U.S.C. § 552a(b)(11), this Protective Order authorizes Defendants to produce personally identifiable information that would otherwise be prohibited from disclosure under the Privacy Act, 5 U.S.C. § 552a, and without presenting Privacy Act objections to this Court for a decision regarding disclosure. To the extent the Privacy Act allows the disclosure of information pursuant to a Court order, this Order constitutes such a Court Order and authorizes the disclosure of that information. However, nothing in this paragraph shall require production of information that is prohibited from disclosure (even with the entry of this protective order) by other applicable privileges, statutes, regulations or authorities by which any party may be bound. The terms of this Protective Order shall also govern the safeguarding of such information by all individuals referenced herein.

Accordingly, the parties hereby stipulate to and petition the court to enter the following Stipulated Protective Order. The parties acknowledge that this agreement is consistent with Local Civil Rule (LCR) 26(c). It does not confer blanket protection on all disclosures or responses to discovery, the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles, and it does not presumptively entitle parties to file confidential information under seal.

2. “CONFIDENTIAL” MATERIAL

“Confidential” material shall include the following documents and tangible things produced or otherwise exchanged:

- a) immigration information or status, personal financial or tax information, physical and mental health information, employment records and personnel files, criminal arrest or conviction information, and confidential or sensitive personally identifying

¹ This proposed protective order departs from this district’s model protective order. Pursuant to Local Civil Rule 26(c)(2), a red-lined version is attached as Exhibit 1 identifying the departures.

information including but not limited to home address, home phone number, cell phone number, email address, passport number, driver's license number, resident identification number, or alien number. "Confidential" material includes the information subject to mandatory redaction under Federal Rule of Civil Procedure 5.2(a); and

b) personally identifiable information or medical information of individuals who are or were in the custody of the Department of Homeland Security and third parties and any information that is protected or restricted from disclosure by statute or regulation, including but not limited to the Privacy Act, but which the Court may order to be produced.

Other than protection of Privacy Act protected information, nothing in this order limits in any way any other restrictions on the release of information, including restrictions on release of classified or privileged information, required or permitted by law.

3. SCOPE

The protections conferred by this agreement cover not only confidential material (as defined above), but also (1) any information copied or extracted from confidential material; (2) all copies, excerpts, summaries, or compilations of confidential material; and (3) any testimony, conversations, or presentations by parties or their counsel that might reveal confidential material.

However, the protections conferred by this agreement do not cover information that is in the public domain or becomes part of the public domain through trial or otherwise.

4. ACCESS TO AND USE OF CONFIDENTIAL MATERIAL

4.1 Basic Principles. A receiving party may use confidential material that is disclosed or produced by another party or by a non-party in connection with this case only for prosecuting, defending, or attempting to settle this litigation. Confidential material may be disclosed only to the categories of persons and under the conditions described in this agreement. Confidential material

1 must be stored and maintained by a receiving party at a location and in a secure manner that ensures
2 that access is limited to the persons authorized under this agreement.

3 4.2 Disclosure of “CONFIDENTIAL” Information or Items. Unless otherwise ordered
4 by the court or permitted in writing by the designating party, a receiving party may disclose any
5 confidential material only to:

6 (a) the receiving party’s counsel of record in this action, as well as employees
7 of counsel’s organization or those sharing a privilege with counsel of record with respect to this
8 litigation and to whom it is reasonably necessary to disclose the information;

9 (b) the client representatives of the receiving party to whom disclosure is
10 reasonably necessary for this litigation, unless the parties agree that a particular document or
11 material produced is for Attorney’s Eyes Only and is so designated;

12 (c) experts and consultants to whom disclosure is reasonably necessary for this
13 litigation and who have signed the “Acknowledgment and Agreement to Be Bound” (Exhibit A);

14 (d) the court, court personnel, and court reporters and their staff;

15 (e) copy or imaging services retained by counsel to assist in the duplication of
16 confidential material, provided that counsel for the party retaining the copy or imaging service
17 instructs the service not to disclose any confidential material to third parties and to immediately
18 return all originals and copies of any confidential material;

19 (f) during their depositions, witnesses in the action to whom disclosure is
20 reasonably necessary and who have signed the “Acknowledgment and Agreement to Be Bound”
21 (Exhibit A), unless otherwise agreed by the designating party or ordered by the court. Pages of
22 transcribed deposition testimony or exhibits to depositions that reveal confidential material must
23 be so designated; and

24 (g) the author or recipient of a document containing the information or a
25 custodian or other person who otherwise possessed or knew the information.

4.3 Filing Confidential Material. Before filing confidential material or discussing or referencing such material in court filings, the filing party shall confer with the designating party, in accordance with LCR 5(g)(3)(A), to determine whether the designating party will remove the confidential designation, whether the document can be redacted, or whether a motion to seal or stipulation and proposed order is warranted. During the meet and confer process, the designating party must identify the basis for sealing the specific confidential information at issue, and the filing party shall include this basis in its motion to seal, along with any objection to sealing the information at issue. LCR 5(g) sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the court to file material under seal. A party who seeks to maintain the confidentiality of its information must satisfy the requirements of LCR 5(g)(3)(B), even if it is not the party filing the motion to seal. Failure to satisfy this requirement will result in the motion to seal being denied, in accordance with the strong presumption of public access to the Court's files.

5. DESIGNATING PROTECTED MATERIAL

5.1 Exercise of Restraint and Care in Designating Material for Protection. Each party or non-party that designates information or items for protection under this agreement must take care to limit any such designation to specific material that qualifies under the appropriate standards. The designating party must designate for protection only those parts of material, documents, items, or oral or written communications that qualify, so that other portions of the material, documents, items, or communications for which protection is not warranted are not swept unjustifiably within the ambit of this agreement.

Mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose (e.g., to unnecessarily encumber or delay the case development process or to impose unnecessary expenses and burdens on other parties) expose the designating party to sanctions.

1 If it comes to a designating party's attention that information or items that it designated for
 2 protection do not qualify for protection, the designating party must promptly notify all other parties
 3 that it is withdrawing the mistaken designation.

4 5.2 Manner and Timing of Designations. Except as otherwise provided in this
 5 agreement (see, *e.g.*, second paragraph of section 5.2(a) below), or as otherwise stipulated or
 6 ordered, disclosure or discovery material that qualifies for protection under this agreement must
 7 be clearly so designated before or when the material is disclosed or produced.

8 (a) Information in documentary form: (*e.g.*, paper or electronic documents and
 9 deposition exhibits, but excluding transcripts of depositions or other pretrial or trial proceedings),
 10 the designating party must affix the word "CONFIDENTIAL" to each page that contains
 11 confidential material.

12 (b) Testimony given in deposition or in other pretrial proceedings: the parties
 13 and any participating non-parties must identify on the record, during the deposition or other pretrial
 14 proceeding, all protected testimony, without prejudice to their right to so designate other testimony
 15 after reviewing the transcript. Any party or non-party may, within fifteen (15) days after receiving
 16 the transcript of the deposition or other pretrial proceeding, designate portions of the transcript, or
 17 exhibits thereto, as confidential. If a party or non-party desires to protect confidential information
 18 at trial, the issue should be addressed during the pre-trial conference.

19 (c) Other tangible items: the producing party must affix in a prominent place
 20 on the exterior of the container or containers in which the information or item is stored the word
 21 "CONFIDENTIAL." If only a portion or portions of the information or item warrant protection,
 22 the producing party, to the extent practicable, shall identify the protected portion(s).

23 5.3 Inadvertent Failures to Designate. If timely corrected, an inadvertent failure to
 24 designate qualified information or items does not, standing alone, waive the designating party's
 25 right to secure protection under this agreement for such material. Upon timely correction of a
 26

1 designation, the receiving party must make reasonable efforts to ensure that the material is treated
2 in accordance with the provisions of this agreement.

3 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

4 6.1 Timing of Challenges. Any party or non-party may challenge a designation of
5 confidentiality at any time. Unless a prompt challenge to a designating party's confidentiality
6 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary economic
7 burdens, or a significant disruption or delay of the litigation, a party does not waive its right to
8 challenge a confidentiality designation by electing not to mount a challenge promptly after the
9 original designation is disclosed.

10 6.2 Meet and Confer. The parties must make every attempt to resolve any dispute
11 regarding confidential designations without court involvement. Any motion regarding confidential
12 designations or for a protective order must include a certification, in the motion or in a declaration
13 or affidavit, that the movant has engaged in a good faith meet and confer conference with other
14 affected parties in an effort to resolve the dispute without court action. The certification must list
15 the date, manner, and participants to the conference. A good faith effort to confer requires a face-
16 to-face meeting or a telephone conference.

17 6.3 Judicial Intervention. If the parties cannot resolve a challenge without court
18 intervention, the designating party may file and serve a motion to retain confidentiality under
19 LCR 7 (and in compliance with LCR 5(g), if applicable). The burden of persuasion in any such
20 motion shall be on the designating party. Frivolous challenges, and those made for an improper
21 purpose (*e.g.*, to harass or impose unnecessary expenses and burdens on other parties) may expose
22 the challenging party to sanctions. All parties shall continue to maintain the material in question
23 as confidential until the court rules on the challenge.

7. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER LITIGATION

If a party is served with a subpoena or a court order issued in other litigation that compels disclosure of any information or items designated in this action as “CONFIDENTIAL,” that party must:

(a) promptly notify the designating party in writing and include a copy of the subpoena or court order;

(b) promptly notify in writing the party who caused the subpoena or order to issue in the other litigation that some or all of the material covered by the subpoena or order is subject to this agreement. Such notification shall include a copy of this agreement; and

(c) cooperate with respect to all reasonable procedures sought to be pursued by the designating party whose confidential material may be affected.

8. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

If a receiving party learns that, by inadvertence or otherwise, it has disclosed confidential material to any person or in any circumstance not authorized under this agreement, the receiving party must immediately (a) notify in writing the designating party of the unauthorized disclosures, (b) use its best efforts to retrieve all unauthorized copies of the protected material, (c) inform the person or persons to whom unauthorized disclosures were made of all the terms of this agreement, and (d) request that such person or persons execute the “Acknowledgment and Agreement to Be Bound” that is attached hereto as Exhibit A.

9. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED MATERIAL

When a producing party gives notice to receiving parties that certain inadvertently produced material is subject to a claim of privilege or other protection, the obligations of the receiving parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B). This provision

is not intended to modify whatever procedure may be established in an e-discovery order or agreement that provides for production without prior privilege review. The parties agree to the entry of a non-waiver order under Fed. R. Evid. 502(d) as set forth herein.

10. NON TERMINATION AND RETURN OF DOCUMENTS

To the extent consistent with applicable records-retention laws or other requirements, within sixty (60) days after the termination of this action, including all appeals, each receiving party must return all confidential material to the producing party, including all copies, extracts and summaries thereof. Alternatively, the parties may agree upon appropriate methods of destruction.

Notwithstanding this provision, counsel are entitled to retain one archival copy of all documents filed with the court, trial, deposition, and hearing transcripts, correspondence, deposition and trial exhibits, expert reports, attorney work product, and consultant and expert work product, even if such materials contain confidential material.

The confidentiality obligations imposed by this agreement shall remain in effect until a designating party agrees otherwise in writing or a court orders otherwise.

IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.

Respectfully submitted this 19th day of May 2020.

ROBERT W. FERGUSON
Attorney General

BRIAN T. MORAN
United States Attorney

s/ Colleen M. Melody
COLLEEN M. MELODY, WSBA #42275
Civil Rights Division Chief
MARSHA CHIEN, WSBA #47020
MITCHELL A. RIESE, WSBA #11947
Assistant Attorneys General
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744
Colleen.Melody@atg.wa.gov
Marsha.Chien@atg.wa.gov
Mitchell.Riese@atg.wa.gov

s/ Kristin B. Johnson
KRISTIN B. JOHNSON WSBA #28189
Assistant United States Attorney
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271
Telephone No. (206) 553-7970
Fax No. (206) 553-4073
kristin.b.johnson@usdoj.gov

Attorney for Defendants

Attorneys for Plaintiff

STIPULATED PROTECTIVE ORDER --
NO. 2:19-cv-02043-TSZ

1 PURSUANT TO STIPULATION, IT IS SO ORDERED

2 IT IS FURTHER ORDERED that pursuant to Fed. R. Evid. 502(d), the production of any
3 documents in this proceeding shall not, for the purposes of this proceeding or any other federal or
4 state proceeding, constitute a waiver by the producing party of any privilege applicable to those
5 documents, including the attorney-client privilege, attorney work-product protection, or any other
6 privilege or protection recognized by law.

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8 Dated this _____ day of _____.

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10 _____
11 The Honorable Thomas S. Zilly
12 United States District Court Judge
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EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
 _____ [print or type full address], declare under penalty of
 perjury that I have read in its entirety and understand the Stipulated Protective Order that was
 issued by the United States District Court for the Western District of Washington on [date] in the
 case of **State of Washington v. U.S. Department of Homeland Security, Chad Wolf, in his
 official capacity as Acting Secretary of U.S. Department of Homeland Security, U.S.
 Immigration and Customs Enforcement, Matthew T. Albence, in his official capacity as
 Acting Director of U.S. Immigration and Customs Enforcement, U.S. Customs and Border
 Protection, Mark Morgan, in his official capacity as Acting Commissioner of U.S. Customs
 and Border Protection, Case No. 2:19-cv-02043-TSZ.** I agree to comply with and to be bound
 by all the terms of this Stipulated Protective Order and I understand and acknowledge that failure
 to so comply could expose me to sanctions and punishment in the nature of contempt. I solemnly
 promise that I will not disclose in any manner any information or item that is subject to this
 Stipulated Protective Order to any person or entity except in strict compliance with the provisions
 of this Order.

I further agree to submit to the jurisdiction of the United States District Court for the
 Western District of Washington for the purpose of enforcing the terms of this Stipulated Protective
 Order, even if such enforcement proceedings occur after termination of this action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____

Signature: _____

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the United States District Court using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated this 19th day of May in Seattle, Washington.



CAITILIN HALL
Legal Assistant